



38 CFR Part 38

RIN 2900-AR80

Persons Eligible for Burial

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is revising its regulations regarding persons eligible for interment in a national cemetery, documentation associated with requests for interment, and eligibility for headstones or markers to implement new authorities provided in the National Defense Authorization Act for Fiscal Year 2022 (NDAA FY22). Section 6601 of NDAA FY22 expanded eligibility for interment in national cemeteries to include certain individuals who served with a special guerrilla unit or irregular forces operating from a base in Laos in support of the Armed Forces during a specified time period. VA is amending its regulations to reflect this expanded eligibility.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Daniel Catron, Supervisory Program Analyst, National Cemetery Administration, 41B2, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC, 20420. Telephone: (314) 416-6324. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On February 16, 2023, VA published a proposed rule in the Federal Register (88 FR 10065) that proposed to revise VA regulations regarding persons eligible for interment in a national cemetery, documentation associated with requests for interment, and eligibility for headstones or markers. The

public comment period ended on April 17, 2023, and VA received six comments in response to the proposed rule.

Technical Correction

During the final rule drafting process, VA noted an inaccuracy in proposed 38 CFR 38.619(a)(2)(i)(A), which we corrected in this final rule. In the proposed rule, we drafted the last sentence of the paragraph to read: “VA will retrieve naturalization records from the U.S. Citizenship and Immigration Services to verify that the naturalization was pursuant to section 2(1) of the Act.” We clarify that VA verifies naturalization with the U.S. Citizenship and Immigration Services, but we do not receive or maintain naturalization records used for eligibility determinations. For this reason, the corrected language reads: “VA will verify with the U.S. Citizenship and Immigration Services that the naturalization was pursuant to section 2(1) of the Act.” This correction does not alter the process reflected by that paragraph nor does it affect the public in any way.

Public Comment Analysis

Two commenters provided very brief remarks stating their support for expanding eligibility for burial in a VA national cemetery but made no specific mention of the proposed rule itself or the regulatory language. VA appreciates the supportive comments; however, we note that eligibility for burial was expanded to this special group of persons by Congress and was not a result of the rulemaking. Since the commenters raised no questions or concerns and suggested no changes to the proposed regulatory implementation, VA will make no changes to the proposed regulatory text based on these comments.

Another commenter provided a brief statement of support for expanding burial eligibility and noted the criteria for eligibility and documentary evidence outlined in the

rulemaking was clear. The commenter stated support for the rule, which VA appreciates. Since the commenter raised no questions or concerns and suggested no changes to the proposed regulatory implementation, VA will make no changes to the proposed regulatory text based on these comments.

One commenter provided a statement of support for the rule, but also questioned why non-citizens should be excluded from the rule. At the outset, we note that this rule includes not just individuals who became United States citizens, but also non-citizens lawfully admitted for permanent residence in the United States at the time of their death. In any event, this decision to focus on citizenship and permanent residency was Congress's, not VA's. 38 U.S.C. 2402(a)(10). This rule simply implements an extension of eligibility that Congress has legislated.

Moreover, while the commenter asserts that it is arbitrary to discriminate against non-citizen veterans, that assertion is premised on a misunderstanding of the definition of "veteran." For VA benefit purposes, "veteran" is defined at 38 U.S.C. 101(2) and requires service in the active military, naval, air, or space service in the United States Armed Forces. The individuals at issue here, who served with a special guerrilla unit or irregular forces operating from a base in Laos, were not members of the United States Armed Forces and do not meet the definition of "veteran" for VA benefit purposes. And while Congress has included them as eligible for burial in 38 U.S.C. 2402(a)(10), Congress also provided certain qualifications related to citizenship and residency status at the time of death. We appreciate this commenter's concerns but will make no changes to the regulation based on this comment.

Another commenter stated support for the proposed rule but expressed concern that the rule does not specify how the documentation provided as evidence of service in support of a request for burial will be verified. The commenter suggested that the rule should specify how evidence will be corroborated and that VA should set a low standard

for this matter so that people who have honorably served our country should get the benefit of the doubt. The commenter asserted that expanding the criteria that VA will use to evaluate the strength of evidence would be helpful for decedent representatives in gathering the documentation. Similarly, another commenter requested that evidence submitted by families of individuals who served with a special guerrilla unit or irregular forces be added explicitly to the types of documentation that VA will accept as evidence of service.

To the extent these comments are predicated on the possible difficulties in obtaining official government documentation as proposed in § 38.619(a)(2)(ii)(A), or obtaining affidavits of the decedent's superior officer, or two other individuals who also served and knew of the decedent's service as proposed in § 38.619(a)(2)(ii)(B) and (C), that is why VA included § 38.619(a)(2)(ii)(D) in the proposed (and this final) rule. This provision constitutes confirmation that VA will accept other appropriate evidence as proof of service for these individuals. Moreover, in considering the issue, VA will provide assistance and give claimants the benefit of the doubt, in accord with its statutory duties. 38 U.S.C. 5103A, 5107(b).

As explained in the proposed rule, VA recognizes the challenge of verifying an individual's service with a special guerilla unit or irregular forces operating from a base in Laos in support of the Armed Forces between February 28, 1961, and May 7, 1975. No U.S. government agency has records of such service. So, VA is implementing the same evidentiary requirement Congress outlined in section 4 of the Hmong Veterans Naturalization Act of 2000, Public Law 106-207, which permits VA to consider any "appropriate proof" of qualifying service.

Again, to the extent the commenter had concerns over interpretations or assumptions regarding the type of evidence allowed in proposed § 38.619(a)(2)(ii)(D), VA confirms here that the regulatory text allows for the consideration of all appropriate

evidence that factually documents the service, location and dates served. Because this provision is broad, we will make no changes to the regulatory text based on these comments.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). The factual basis for this certification is

the fact that the rule simply describes a new category of persons eligible for interment in national cemeteries and the associated documentation to substantiate eligibility. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA submitted a copy of this rulemaking action to OMB for review and approval. OMB has reviewed and approved this revised collection of information.

Congressional Review Act

Pursuant to Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Assistance Listing

The Assistance Listing numbers and titles for the program affected by this document are 64.201, National Cemeteries; 64.203, Veterans Cemetery Grants Program; and 64.206, VA Outer Burial Receptacle Allowance Program.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on July 28, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 38 as set forth below:

PART 38 — NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 is revised to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 531, 2306, 2400, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Amend § 38.619 by adding paragraph (a)(2) to read as follows:

§ 38.619 Requests for interment, committal services or memorial services, and funeral honors.

(a) * * *

(2) *Interment requests pursuant to § 38.620(j).* (i) Consistent with paragraph (a)(1)(i) of this section, interment requests pursuant to § 38.620(j) must include the following:

(A) For decedents who were naturalized under section 2(1) of the Hmong Veterans Naturalization Act of 2000 (the Act), a copy of the official U.S. Certificate of Naturalization. (VA will verify with the U.S. Citizenship and Immigration Services that the naturalization was pursuant to section 2(1) of the Act.)

(B) For decedents who were otherwise naturalized, a copy of the U.S. Certificate of Naturalization and documentation of the decedent's honorable service with a special guerilla unit or irregular forces operating from a base in Laos in support of the Armed Forces at any time between February 28, 1961, and May 7, 1975.

(C) For decedents who were not naturalized but were lawfully admitted for permanent residence in the U.S., a copy of the official documentation of status as a lawful permanent resident, and documentation of the decedent's honorable service with

a special guerilla unit or irregular forces operating from a base in Laos in support of the Armed Forces at any time between February 28, 1961, and May 7, 1975.

(D) Evidence that the decedent resided in the U.S. at the time of death.

(ii) VA will accept the following types of documentation as evidence of service described in paragraphs (a)(2)(i)(B) and (C) of this section:

(A) Original documentation issued by a government agency officially documenting the service type, location, and dates served;

(B) An affidavit of the decedent's superior officer attesting to the type of service, location, and dates served;

(C) Two affidavits from other individuals who were also serving with such a special guerilla unit or irregular forces and who personally knew of the decedent's service; or

(D) Other appropriate evidence that factually documents the service, location, and dates served.

(iii) The DD Form 214, Certificate of Release or Discharge from Active Duty, is not an appropriate documentation of service for purposes of paragraphs (a)(2)(i)(B) and (C) of this section.

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3. Amend § 38.620 by revising paragraph (j) to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

(j) Any individual who:

(1) Died on or after March 23, 2018; and

(2) Resided in the United States at the time of their death; and

(3) Either:

(i) Was naturalized pursuant to section 2(1) of the Hmong Veterans' Naturalization Act of 2000 (Pub. L. 106-207, 114 Stat. 316; 8 U.S.C. 1423 note); or

(ii) Served honorably with a special guerilla unit or irregular forces operating from a base in Laos in support of the Armed Forces at any time between February 28, 1961, and May 7, 1975; and was, at the time of the individual's death, a citizen of the United States or an alien lawfully admitted for permanent residence in the United States.

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4. Amend § 38.630 by revising paragraphs (a)(1)(ii)(F) and (a)(2)(i)(F) to read as follows:

§ 38.630 Burial headstones and markers; medallions.

(a) * * *

(1) * * *

(ii) * * *

(F) Individuals who were naturalized pursuant to section 2(1) of the Hmong Veterans' Naturalization Act of 2000, or who served honorably with a special guerilla unit or irregular forces operating from a base in Laos in support of the Armed Forces, as described in and subject to § 38.620(j).

* * * * *

(2) * * *

(i) * * *

(F) Individuals who were naturalized pursuant to section 2(1) of the Hmong Veterans' Naturalization Act of 2000, or who served honorably with a special guerilla unit or irregular forces operating from a base in Laos in support of the Armed Forces, as described in and subject to § 38.620(j).

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